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No. 04-766

In the

Supreme Court of the United States

LAMERS DAIRY, INC.,

Petitioner,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR REHEARING

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INTRODUCTION

Pursuant to Rule 44, the petitioner, Lamers Dairy, Inc. ("Lamers"), respectfully requests this Court to grant its petition for rehearing on its petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit. The issues involved in this case go to the heart of the milk order system, which was established by Congress "principally for the economic protection of producer and consumer." U.S. v. Mills, 315 F.2d 828, 837 (4th Cir. 1963).

However, the respondent, United States Department of Agriculture (the "USDA"), is not administering the system in a manner which can or will accomplish these objectives. Consequently, intervention by this Court is necessary to safeguard the economic interests of producers and consumers by eliminating the discriminatory treatment and unfair trade practices involving handlers like Lamers.

REASONS FOR GRANTING THIS PETITION:

I. The USDA Admits To Disparate Treatment Of Milk Handlers Under The AMAA.

In its brief in opposition to the petition of Lamers for a writ of certiorari, the USDA admits that the Secretary of Agriculture's administration of the Agricultural Marketing Agreement Act of 1937, as amended (the "AMAA"), is not applied on a market-wide basis or to all handlers as required under 7 U.S.C. §608c (5)(B)(ii) and §608c (5)(A). (Resp. Br., pp. 3-4,

8-9). Nevertheless, the USDA seeks to legitimize its disparate treatment of handlers of milk under the AMAA and the Upper Midwest's Milk Marketing Order No. 30 by distinguishing fluid milk handlers from other handlers. By doing so, the USDA is inserting words into the AMAA which Congress did not choose to include.[1]

In fact, 7 U.S.C. §608c (5) specifically applies to "milk and its products" (emphasis added), thereby deliberately encompassing butter, cheese, dry milk powder, and other Class II, III, and IV uses in addition to fluid milk for consumption. Likewise, the term "handler" is broadly defined as "any person who operates a pool plant or a non-pool plant," 7 C.F.R. §1000.9, and is never restricted to merely mean a "fluid milk handler." Thus, under the established statutory and regulatory milk system, Lamers, as a "handler", is similarly situated to plant operator "handlers" such as cheese processors and manufacturers of other milk products, and should be granted similar treatment - a playing field level with

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[1] The USDA's argument essentially hinges on reasoning applicable to individual handler pools, which focus on each separate handler's end uses of milk, rather than on market-wide pooling which looks at all milk handlers collectively. Under the market-wide pooling scheme of Milk Market Order No. 30, end use distinctions should be nullified by the equalization of payments among producers through the uniform minimum pricing requirements determined through blend pricing.

other milk handlers - on constitutional equal protection and fair trade practice grounds.

Due to the USDA's tacit admission that it differentiates between handlers of fluid milk and handlers of milk for manufacturing uses despite the lack of any statutory authority granted by Congress under the AMAA to do so, the deferential review and rational basis grounds relied upon by the USDA and the Seventh Circuit Court of Appeals are not applicable in the case. Review by this Court should be granted to protect the fundamental constitutional rights of Lamers and other fluid milk handlers in procuring equal treatment with other handlers under the AMAA.

II. The Dairy Industry's Changed Circumstances Warrants This Court's Review.

This Court has previously held that ". . . a regulation which for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts." Nebbia v. New York, 291 U.S. 502, 525 (1934). This Court's conclusion was grounded upon the underlying principle that "the means selected shall have a real and substantial relation to the object sought to be attained." Id.

Ignoring the statutory policy of the AMAA declared by Congress in 7 U.S.C.§602(1), the USDA asserts that "[t]he fundamental purpose of the AMAA is to prevent milk producers *from flooding the fluid market* by establishing uniform prices that handlers must pay to milk producers regardless of the milk's end use." (Resp. Br., p.8)(emphasis added). Because fluid milk handlers strategically will not and economically cannot purchase more fluid milk than the handlers' customers will or can consume within current demand, it is impossible for producers to flood the fluid milk market.

In actuality, Congress enacted the AMAA to address the disparate treatment of *producers* arising out of the fluctuations in milk supply and demand. Lehigh Valley Cooperative Farmers, Inc. v. United States, 370 U.S. 76, 79-80 (1962)(emphasis added). Consequently, under the AMAA, payments to and from the producer-settlement fund are made so that each handler "eventually pays out-of-pocket an amount equal to the actual utilization value of the milk he has bought." Id.[2] However, the AMAA does not give the Secretary or the USDA statutory authority to impose mandatory participation in the milk regulatory system by Class I bottlers like Lamers while at the same time permitting voluntary participation by Class II, III, and

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[2] To further emphasize the point of Section I above, these pool payments specifically apply to each handler, not just fluid milk handlers.

IV manufacturers. By definition, all of these operators are "handlers." Thus, it is this mandatory versus voluntarily distinction arbitrarily drawn by the Secretary and the USDA in contravention to the statutory dictates of the AMAA which Lamers seeks this Court to review and redress on constitutional equal protection and unfair trade practice grounds.

All handlers compete for an adequate supply of Grade "A" milk, regardless of what class the end use of that milk might be. Allowing the milk marketing system to provide economic advantages for some handlers over others in procuring their milk supply is patently unfair and violates these other handlers' constitutional equal protection rights. Congress has dictated that all unfair methods of competition in commerce are declared unlawful. 15 U.S.C. §45(a)(1). By permitting Class II, III, and IV handlers to voluntarily pool their milk under Milk Market Order No. 30, the USDA promotes unfair competition against Class I handlers like Lamers by failing to provide equal protection as to all handlers and permits the wholesale circumvention of the milk marketing system it is supposed to uphold in an unfair and discriminatory manner.

Furthermore, the USDA's real life administration of the milk marketing system has created disorder, eliminated a stable competitive environment, and fostered monopolistic practices by non-fluid milk handlers. Statistical evidence

demonstrates that, since the 1930s when Congress implemented this system, millions of family farms have been lost, fluid milk consumption has fallen in comparison to the corresponding rise in cheese production, and production and handling segments of the dairy industry have been consolidated. Such dismal industry results should not be surprising from a system which now routinely permits as much as 70% of milk production to skirt the "market-wide" pool, thereby creating an economic incentive for non-fluid handlers of such depooled milk to avoid paying millions of dollars into the pool.

Because of the dramatically-changed circumstances of the dairy industry since the AMAA's enactment, this Court's review of how the USDA is wrongly administering the system is clearly warranted on equal protection and fair trade practice grounds. Lamers is entitled to just and equitable treatment, which the USDA is incapable of providing due to the manner it has chosen to differentiate between milk handlers. This Court can right the wrongs resulting from the USDA's faulty administration of the milk order system in the Upper Midwest by granting Lamers' petition.

III. The USDA's Administration Of Milk Market Order No. 30 Promulgates Disorderly Marketing Conditions.

The USDA asserts that the AMAA "requires only that handlers pay to producers at least a uniform *minimum* price," citing 7 U.S.C. 608c(5)(B). (Resp. Br., p. 8). What the USDA fails to point out is that its administration of Milk Market Order No. 30 does not meet this AMAA requirement because Class II, III, and IV handlers are allowed to pool and depool milk on an unrestricted basis. When handlers are permitted to opt out of the pool at will, their milk is unregulated and producers can no longer be assured of at least a uniform minimum price. The end result is disorderly marketing in contravention to the objectives of the federal milk order system. See, e.g., Public Hearing Docket No. AO-361-A39; DA-04-03, Hearing Transcript, p. 318 (Testimony of Dr. Edward Jesse, Federal Milk Marketing Order expert) and Ex. 27, p. 16 (Jesse and Cropp, *Federal Milk Marketing Order Pooling, Depooling, and Distant Pooling: Issues and Impacts*, Marketing and Policy Briefing Paper, No. 85, June 2004).

The USDA acknowledges that Class III handlers have an incentive to depool when price inversion occurs such that the price of Class III milk exceeds the price of Class I milk and/or the normal blend price, but erroneously refers to such market conditions as "rare instances." (Resp. Br., p. 3)(emphasis added). In reality, price inversion, with the resulting depooling, has occurred in 10 months in the last 24 months. Office of Federal Milk Market Administrator, Upper Midwest Marketing Area,

Federal Order No. 30 (reports for March 2003 - February 2005). Clearly, price inversion is currently a common market event which the USDA is handling in a manner wholly inconsistent with the AMAA's concept of market-wide pooling and its objective of orderly marketing. Judicial intervention is necessary to ensure fair and equitable treatment for all handlers and all producers under the AMAA. This Court should accept review of this matter.

CONCLUSION

The essence of Lamers' petition challenging the USDA's administration of the Upper Midwest milk order under the AMAA, albeit on due process rather than equal protection and unfair trade practice grounds, may best be summed up through the words of Justice Roberts:

> "As the order is drawn and administered it inevitably tends to destroy the business of smaller handlers by placing them at the mercy of their larger competitors. I think no such arrangement was contemplated by the Act, but that, if it was, it operates to deny the appellees due process of law."

United States v. Rock Royal Co-op, 307 U.S. 533, 587 (1939)(J. Roberts, dissenting).

For of all the foregoing reasons and for the reasons set forth in its petition for a writ of certiorari on file in the above-entitled case, the petitioner, Lamers Dairy, Inc., respectfully requests that this Court grant its petition for rehearing and undertake a review of this matter.

Respectfully submitted,

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March 2005

RULE 44.2 CERTIFICATION

The undersigned hereby certifies that the foregoing petition for rehearing is grounded upon intervening circumstances of a substantial or controlling effect and/or to other substantial grounds not previously presented. The undersigned further certified that the foregoing petition for rehearing is presented in good faith and not for delay.

Dated at Appleton, Wisconsin, this 30th day of March, 2005.

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